LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 14 1962
JOHN F. DAVIS, CLERK

No. 675

In the Supreme Court of the United States

OCTOBER TERM, 1961

JOSEPH H. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	7

CITATIONS

Cases:

Bell v. United States, 254 F. 2d 82, certiorari vacated, 358 U.S. 885	6
Davis v. United States, 328 U.S. 582	5
Elkins v. United States, 364 U.S. 206	6
Henry v. United States, 361 U.S. 98	6
Rios v. United States, 364 U.S. 253	6
United States v. Mitchell, 322 U.S. 65	6, 7
Upshaw v. United States, 335 U.S. 410	7
Zap v. United States, 328 U.S. 624	5

Constitution and Statute:

U.S. Constitution, Fourth Amendment	5
18 U.S.C. 659	2

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 675

JOSEPH H. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; II R. 14-19)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered November 21, 1961 (Pet. App. B; II R. 20). On December 1, 1961, the Chief Justice extended the time to file a petition for a writ of certiorari to and including January 20, 1962. The petition for a writ of cer-

[1] The record filed by petitioner is in two parts. Volume I consists of petitioner's appendix in the court of appeals and will be cited as "I R." Volume II consists of the government appendix below and proceedings before the court of appeals, and will be cited as "II R."

tiorari was filed on January 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the seizure of evidence with the consent of petitioner was proper.

2. Whether an alleged illegal detention by city police vitiated the federal conviction.

3. Whether the evidence was sufficient to support petitioner's conviction for possessing goods stolen from an interstate shipment knowing that they had been stolen.

STATUTE INVOLVED

Section 659 of Title 18 U.S.C. provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen * * *
>
> * * * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such

money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * * *

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of South Carolina on one count charging the knowing possession of goods stolen from an interstate shipment, in violation of 18 U.S.C. 659 (I R. 3-4; I R. 50). Petitioner was sentenced to imprisonment for one year (I R. 55). The court of appeals affirmed *per curiam* (II R. 14-19).

No question was raised whether the goods were stolen from an interstate shipment. On the other issues, the uncontested pertinent facts may be summarized as follows:

On July 6, 1960, Sergeant Harold E. Whiteley of the Charleston City Police Department was on patrol at 2 a.m. when he noticed someone walk away from a black Plymouth parked at the curb near Line Street and St. Phillips Street (I R. 2-4, 13). At approximately 2:20 a.m.,[2] petitioner came out of a night club which he operated on the same corner, walked over to the patrol car, which had stopped for the traffic light, and talked briefly with the policeman (I R. 4-5). On a later round, the policeman again noticed the person, whom he had originally seen, still standing on

[2] Petitioner had known the policeman for many years (I R. 44). Petitioner had an extensive criminal record (I R. 52-53).

the corner (I R. 5). As Whiteley continued his patrol, he next saw petitioner 1½ blocks from his tavern standing in the doorway of a grocery (I R. 5, 15). Shortly thereafter, he received a radio call "that an automobile was being unloaded" at Lane and St. Phillips Streets (I R. 5, 15). Just as he was arriving, he saw one person run across the street and through an alley (I R. 5, 13). As he stopped his car, he saw two men walk away from the entrance to petitioner's apartment (above the night club) and stand on the corner (I R. 6). The policeman walked over to the Plymouth and noticed cases of Schlitz beer on the back seat (I R. 6). At that time, other officers arrived and asked the two men on the corner to whom did the car belong. One of them replied that "it did belong to him at one time but that he had sold it." (I R. 6). One of the men stated that the only thing he knew about the man who ran across the street was that they called him "Tarzan" (I R. 6). The two men were sent to the police station in a cruiser (I R. 6, 15).[*]

Shortly thereafter, the petitioner came down the street and asked the policeman, "What is the trouble, Mr. Whiteley?" The policeman replied, "Brown, you know what the trouble is. I would like to take a look in your place." (I R. 16, 7, 9.)

Petitioner replied, "All right, sir, but before you go in there, I am going to tell you right now, you are going to find 10 cases of that beer in my place" (I R. 9, 7, 16).

---

[*] These two men were indicted in the first and third counts of the indictment (I R. 3-4).

The policeman entered the premises and found 12 cases of the Schlitz beer in the hallway on the second floor (I R. 9). At that point the policeman told petitioner, "Well, Joe, you know what this is going to mean," and petitioner replied, "Yes, sir, I know" (I R. 9). The policeman continued, "I am going to have to take you and the beer to headquarters," and petitioner responded, "Yes, sir, I know that" (I R. 9). The policeman took petitioner and the beer to headquarters (I R. 9).

The policeman admitted he had not seen any defendant take beer into petitioner's place, although one defendant had admitted that he took two cases in there (I R. 43, 15–16). The policeman had no search warrant or arrest warrant (I R. 16–17, 44), and had no knowledge at that time that the beer had been taken from the railroad car (I R. 16, 45).*

Petitioner was released by the city police approximately 72 hours later (I R. 12). He was arrested under a federal warrant issued on August 1 (I R. 28).

ARGUMENT

1. Petitioner claims that there was an illegal search and seizure. The undisputed evidence indicates that the seizure was with voluntary consent. The evidence was therefore admissible.

The constitutional protections of the Fourth Amendment are not violated when one voluntarily consents to a search. *Zap* v. *United States*, 328 U.S. 624; *Davis* v. *United States*, 328 U.S. 582. The facts

* The theft from the railroad car was discovered about 8:15 a.m., July 6 (I R. 20).

of the present case show that petitioner voluntarily appeared on the scene and not only gave his consent to search, but frankly and spontaneously admitted the important element of the offense—possession of "that" beer. The consent to the search was part of the admission, made in the realization that a crime had been discovered. It was properly found to be voluntary. See *United States* v. *Mitchell*, 322 U.S. 65, where admissions after arrest and a consent to a search were held to be voluntary.

Petitioner's references to *Elkins* v. *United States*, 364 U.S. 206, and *Rios* v. *United States*, 364 U.S. 253, are clearly inapposite. At no time did the government seek to invoke the "silver platter" doctrine. Since the search was proper, the fact that it was made by a city official rather than a federal officer is irrelevant.

Henry v. *United States*, 361 U.S. 98, is also inapplicable. No officer stopped or detained petitioner. Petitioner voluntarily appeared on the scene of the crime and, apparently recognizing that he could not avoid being implicated, immediately admitted his possession. The fact that the officers did not discover until later that morning that the stolen beer came from a "boxcar" is irrelevant since in its context petitioner's statement was an acknowledgement that the beer was not his. See *Bell* v. *United States*, 254 F. 2d 82 (C.A. D.C.), certiorari denied, 358 U.S. 885.

2. The facts concerning petitioner's claim that his arrest and detention by city police were illegal were not fully developed since they play no part in this

case. The evidence does, however, show a valid arrest, resulting from the immediate detection of a crime then being committed. Petitioner's later detention by the city police is irrelevant, since no evidence resulted therefrom. See *United States* v. *Mitchell*, 322 U.S. 65; *Upshaw* v. *United States*, 335 U.S. 410, 413. There is absolutely no support in this record for petitioner's assertion that he was held "incommunicado" for 72 hours (cf. Pet. 12).

3. Petitioner also presents as a question, but does not argue, the sufficiency of the evidence to show that petitioner had "knowledge of the stolen character of the goods at the time of his arrest." The evidence is unequivocal on this issue. There was no need to rely on the presumption that recent unexplained possession is sufficient, since petitioner's voluntary, undenied admission that he had "that" beer, made before anyone ever mentioned the stolen beer, was clearly indicative of his knowledge. This admission was sufficient to support the verdict of the jury, after a clear and unchallenged charge (R. 49–50).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

FEBRUARY 1962.